No. 76-90

In the Supreme Court of the United States

OCTOBER TERM, 1976

WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 28a-50a) is reported at 531 F. 2d 495. The opinion and order of the Indian Claims Commission (Pet. App. 1a-27a) is reported at 35 Ind. Cl. Comm. 457.

JURISDICTION

The judgment of the Court of Claims was entered on February 18, 1976. A timely motion for rehearing and for rehearing *en banc* was denied on April 23, 1976. The petition for a writ of certiorari was filed on July 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Indian Claims Commission properly denied petitioners intervention before the Commission

to file an amended claim contrary to the claim presented by the authorized representative of the Western Shoshone Identifiable Band or Group.

STATUTE INVOLVED

Section 10 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1052, 25 U.S.C. 70i, provides:

> Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but whenever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

STATEMENT

1. *History of the litigation prior to the appearance of petitioners.*

On August 10, 1951, the Temoak Bands of Western Shoshone Indians (the original plaintiff) filed claims before the Indian Claims Commission on behalf of the Western Shoshone Identifiable Band or Group.[1] One

[1]These claims were assigned Docket No. 326 before the Indian Claims Commission. The claim which is the subject of the present petition was subsequently severed from the original claims and assigned Docket No. 326-K. Order Allowing Severance of Claims, entered by the Indian Claims Commission on August 16, 1967. The original petition filed in 1951 presented claims on behalf of several groups of Shoshone Indians. Docket 326-K deals only with those filed on behalf of the Western Shoshone Identifiable Group.

claim sought compensation for the extinguishment of title to lands aboriginally used and occupied by the Western Shoshone Indians. This claim was tried in August and September 1957 and, on October 16, 1962, the Commission entered an opinion, findings of fact and order holding that the Western Shoshone Indians had held Indian title to 24,396,403 acres of land in the present states of California and Nevada and that the United States had extinguished this title without compensation. *Shoshone Tribe* v. *United States,* 11 Ind. Cl. Comm. 387, 413-414.

In September 1967, the parties proceeded to trial to determine the fair market value of the Western Shoshone lands.[2] On October 11, 1972, the Commission entered further findings of fact and an opinion and order awarding the Western Shoshone Identifiable Group $21,550,000 plus $4,604,600 as compensation for minerals removed prior to the valuation date. *Western Shoshone Identifiable Group* v. *United States,* 29 Ind. Cl. Comm. 5, 124. A third trial was held in October 1973, regarding the setoffs claimed by the United States.[3] By March 5, 1974, the setoff issues had been fully briefed by the United States and the Western Shoshone Identifiable Group and had been submitted to the Commission for decision.

[2]The parties stipulated to the date of valuation, and the Commission approved the chosen date. Order Approving Joint Stipulation as to Date of Valuation, entered on February 11, 1966.

[3]Indian land claims before the Indian Claims Commission are regularly tried in three separate phases: (1) liability or determination of title, (2) valuation and (3) setoff claims by the United States.

2. The appearance of petitioners.

Petitioners, who are members of the Western Shoshone Identifiable Group, appeared for the first time on April 18, 1974, almost 23 years after the original petition was filed, asking leave pursuant to 25 U.S.C. 70i to present an amended claim on behalf of that Group.[4] Petitioners sought intervention to prove that, contrary to the prior decision of the Indian Claims Commission, the Indian title to portions of the Western Shoshone ancestral lands had not been extinguished.[5] The Commission denied petitioners' request (Pet. App. 1a-27a), and the Court of Claims affirmed (Pet. App. 28a-50a).

ARGUMENT

1. Petitioners contend that the exclusive representation provisions of the Indian Claims Commission Act, 25 U.S.C. 70i, deprived them of due process.

The Indian Claims Commission Act provides that "whenever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent [an Indian tribe, band, or other identifiable group of Indians], such organization shall be accorded the exclusive privilege of representing such Indians * * * ." 25 U.S.C. 70i. This requirement is rationally designed to prevent litigation under the Act from becoming burdened by numerous claimants and attorneys and is

[4]Petitioners' document was entitled Petition to Stay Proceedings and for Leave to Present Amended Claim by the United Western Shoshone Legal Defense and Education Association and Frank Temoke.

[5]Petitioners claim that title has not been extinguished to some 12 million acres of the 24,396,403 acres which the Commission found had been held by the Western Shoshone but to which title had been extinguished. Transcript of Oral Argument before the Commission held on November 14, 1974, at 47.

a permissible condition on the waiver of sovereign immunity. See *Ex parte Bakelite Corporation,* 279 U.S. 438, 452; *Schillinger* v. *United States,* 155 U.S. 163, 166.

Petitioners nonetheless argue that representation by the Temoak Bands in this case nullified "the contrary interests of the remainder of the Identifiable Group" (Pet. 12) and that litigation before the Commission must be conducted in the same manner as class actions (Pet. 11-12). But claims presented under the Indian Claims Commission Act, unlike class action claims, are not individual claims. See 25 U.S.C. 70a; *Fort Sill Apache Tribe* v. *United States,* 477 F. 2d 1360, 1362 (Ct. Cl.), certiorari denied, 416 U.S. 993; *Absentee Shawnee Tribe* v. *United States,* 165 Ct. Cl. 510, 514. The rights conferred by aboriginal title belong to the Tribal group, not to its individual members. *Prairie Band of Potawatomi Indians* v. *United States,* 165 F. Supp. 139, 147 (Ct. Cl.). Thus the due process cases petitioners cite (Pet. 12), all of which deal with adequate representation of individual rights, are not pertinent.

Moreover, the Commission has recognized the Temoak Bands as the exclusive representative of the Western Shoshone for this litigation since 1962, the same time it held that the United States had extinguished the Indian title to over 24 million acres of land (11 Ind. Cl. Comm. 387). Petitioners did not appear to challenge either finding at that time or during the subsequent 12 years. Although they now claim that the Temoak Bands do not represent a majority of the Western Shoshone, that position was not even urged before the Commission and,

in any event, is not supported by the record in this case (Pet. App. 42a-43a).[6]

2. Petitioners also contend that the Temoak Bands and the United States engaged in collusion to deprive the Western Shoshone of continued title to 12 million acres of land.

An exception to the provision for exclusive representation is made when "fraud, collusion, or laches on the part of such organization [is] shown to the satisfaction of the Commission." 25 U.S.C. 70i. Petitioners apparently urge (Pet. 12) that collusion is shown whenever the exclusive representative takes a litigating position that does not conflict with the position taken by the government.[7] But collusion "implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful

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[6]Petitioners did not challenge below the right of the original plaintiff to represent the Western Shoshone Identifiable Group absent collusion. Memorandum in Opposition of Government's Motion to Dismiss Petition by United Western Shoshone Legal Defense and Education Association and Frank Temoke filed before the Commission on May 13, 1974, at 9-10.

[7]In its legal memorandum on this issue, petitioners stated: "The question before the Commission then is whether it constitutes 'collusion,' within the meaning of Section 10 of the Indian Claims Commission Act for the representative body to present a claim, which is adverse to the legal interests of members of the identifiable group it represents and which, instead, supports the legal position of the defendant on that issue." Petitioners' Memorandum on Issue of Collusion filed before the Indian Claims Commission on November 7, 1974, at 12-13. Petitioners now suggest (Pet. 13) that they should have been granted a hearing to determine whether collusion (in the accepted sense) was present. The Court of Claims correctly held that petitioners' allegations were "too unsupported and too general to warrant a trial (or evidentiary hearing)" (Pet. App. 49a).

purpose * * *." *Dickerman* v. *Northern Trust Company*, 176 U.S. 181, 190. It would be inappropriate practice under the Indian Claims Commission Act to make intervention by nonrepresentative litigants the price of agreement between the representative ones. As the Court of Claims noted (Pet. App. 42a), petitioners' theory "would undercut the position of the exclusive representative to which Congress assigned the chief management of the litigation."[8] There is nothing in the statute or legislative history to show that Congress meant to use the term "collusion" in this strained sense; in the absence of such clear intention, the ordinary meaning of the term should apply (*Richards* v. *United States*, 369 U.S. 1, 9).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]The Court of Claims noted (Pet. App. 46a) that choice of legal theory "is precisely the kind of litigation strategy the statute leaves to the organized representative * * *." In addition, both the Commission (Pet. App. 16a-21a) and the Court of Claims (Pet. App. 46a) expressed doubt about the merits of petitioners' position.

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